

LeMaster Steel Erectors, Inc. and Eastern Indiana District Council of Carpenters and Joiners of America, a/w United Brotherhood of Carpenters and Joiners of America, Petitioner. Case 25-RC-7859

31 August 1984

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 13 December 1982 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 14 for and 39 against the Petitioner, with 6 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief and has decided to affirm the hearing officer's findings¹ and recommendations only to the extent consistent with this Decision and Certification of Results of Election.

The hearing officer found that the Employer did not substantially comply with the Board's *Excelsior*¹ rule because it withheld the number, the identity, and the temporary living addresses of the eligible voters working out of state during the election campaign. We do not agree with the hearing officer's findings.

On 24 November 1982 the Union timely received an *Excelsior* list containing the names and permanent residential addresses of all 62 eligible voters. The parties stipulated that six of those eligible voters were continuously employed at an out-of-state construction site between the date for determining voter eligibility of 13 November 1982 and the date of the election. The *Excelsior* list provided did not identify these six employees or state their temporary living addresses.

We find that by providing the names and permanent residential addresses of the 62 eligible voters the Employer substantially complied with the *Excelsior* rule. The six employees assigned out of state comprised only 9 percent of the eligible voters. We also note that these employees were at their perma-

nent residential addresses 10 of the 19 days between receipt of the *Excelsior* list and the election date including the 5 days immediately preceding the election date. The Petitioner therefore had ample opportunity for personal contact with these six employees. In all the circumstances, we are satisfied that the refusal to supply the names and temporary residences of the six employees did not evidence bad faith on the Employer's part. We accordingly overrule Objection 1(b) contrary to the hearing officer's recommendation.

We shall certify the results of the election as the Petitioner's objections have been overruled and as the tally of ballots shows that a majority of ballots have not been cast in favor of the Petitioner.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Eastern Indiana District Council of Carpenters and Joiners of America, a/w United Brotherhood of Carpenters and Joiners of America, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, I would affirm the hearing officer's finding that the Employer failed to comply substantially with the *Excelsior* rule when it withheld from the Petitioner the number, names, and temporary living addresses of eligible voters working out of state during the election campaign. Thus, I would set aside the election and direct a second election in the appropriate unit.

The evidence shows that when the Petitioner received the *Excelsior* list on 24 November 1982, it was aware that some employees were working outside the State, but did not know their number, identities, or location. The Petitioner requested that the Employer provide it with the names and out-of-state addresses of these employees, but the Employer refused to do so. After 13 November—the date for determining voter eligibility—the employees working out of state returned to their homes twice: for the Thanksgiving holiday, from 24 through 28 November and from approximately 8 through 13 December, to vote in the election. Inasmuch as the Petitioner did not receive the *Excelsior* list until 24 November, it is unlikely that it was able to communicate with the employees by mail during their first visit home, particularly since it was a holiday period which encompassed a week-end. Because the Petitioner was unaware of the identities of the employees or of the fact that they had returned home, there was little or no possibility of any personal or verbal contact with them.

¹ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In the absence of exceptions thereto we adopt pro forma the hearing officer's recommendation that Objections 2(a) through (e) and Objection 6 be overruled.

² *Excelsior Underwear*, 156 NLRB 1236 (1966).

The hearing officer found **no** evidence that the Petitioner was aware of the employees' return home several days before the election. Thus, she concluded that the employees' sole opportunity to receive communications at their homes was limited to the receipt of documentary information approximately 4 days before the election. I agree with the hearing officer's determination that "[T]he form of the communication and the time of its receipt in relation to the election precluded any meaningful dialogue between the employees and Petitioner concerning issues pertinent to the election."

Withholding from the Petitioner the number, identity, and temporary addresses of employees working out of state during the election campaign deprived the Petitioner of the opportunity to communicate with those employees just as effectively as if the Employer had denied the Petitioner access

to their names and addresses altogether. In this regard, it is significant that the Employer's non-compliance here was in bad faith. Despite twice being requested by the Petitioner to provide the names and temporary addresses of employees working out of state and despite possessing that information, the Employer refused to perform the simple task of providing those names and addresses to the Petitioner.¹ Unlike my colleagues, therefore, I would find in these circumstances that failure to provide the pertinent addresses of more than 9 percent of the eligible voters constitutes substantial failure to comply with the *Excelsior* rule.

Accordingly, I would find merit to the Petitioner's Objection 1(b), and direct a second election.

¹ See, e.g., *North American Space Operations*, 235 NLRB 1159, 1160 (1978); *Sonfarel, Inc.*, 188 NLRB 969 (1971).